CITATIONS

CASES:

TABLE OF CONTENTS

No. 232

In the
Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,
Appellant

v.

BOSTON AND MAINE RAILROAD,
PATRICK B. McGINNIS, GEORGE F. GLACY
and DANIEL A. BENSON,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEE BOSTON AND MAINE RAILROAD

STATUTE INVOLVED

Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. § 20, provides in relevant part:

"No common carrier engaged in commerce shall have any dealings in . . . articles of commerce . . . to the amount of more than $50,000 . . . with another corporation . . . when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer or agent in the particular transaction, any person . . . who has any substantial interest, in such other corporation, . . . [without competitive bidding].

. . .

. . .

"If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation . . . shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both . . . ."

THE GOVERNMENT'S PARTICULARS

In response to the motion of appellee B&M that the government particularize the "nature and extent" of the "substantial interest" which the defendant McGinnis and the B&M's selling agent were alleged to have in International (R. 14), the government declared:

"The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy and Benson, and pursuant to which defendants McGinnis, Glacy and Benson were to and did receive substantial monies." R. 24, 25.

QUESTION PRESENTED

The Particulars allege that officials of a railroad corporation entered into an agreement with another corporation, International, having the purpose of producing profits for International from dealings by it in property acquired from the railroad pursuant to which agreement the officials were to and did receive substantial sums. Did such alleged agreement give the officials an "interest" in International within the meaning of section 10 of the Clayton Act, notwithstanding that the agreement gave the officials no right

to share in International, and notwithstanding that, under such construction, criminal responsibility of the road would be predicated on acts of agents allegedly intended not to advance the interests of the railroad, but to victimize it?

SUMMARY OF ARGUMENT

The agreement particularized neither is itself, nor gives rise to, an "interest" in International on the part of the B&M officials. An "interest", in common usage, is a *right* to *share*. The agreement does not purport to confer any share in International on the officials. The government's statements to the contrary notwithstanding, no more does the agreement purport to confer a share of International's profits on the officials; though, if it did, this would not confer an "interest" in *International*. The agreement, moreover, is illegal, unenforceable and can confer no rights of any kind. Hence, no *right* to share can arise as a result of it, and, again, no "interest".

Words of art in a statute should customarily be given their accepted definitions. Criminal statutes should be strictly construed. These principles both require that the word "interest" in section 10 of the Clayton Act be given its conventional meaning as a right to share. To equate "interest" to general concern would cut future interpreters of the word off from familiar guidelines and concepts and would produce a rule difficult of practical application.

In the legislative history of section 10, the interest limitation was introduced after a complaint concerning the evils of stock ownership by a carrier official in a corporation with which the carrier had dealings. The interest limitation was thereafter explained as an antidote to the ability a carrier official might otherwise have to put his son, cousin or lawyer on the board of a corporation with which

the carrier was to deal, an ability which would stem from stock ownership. This history shows that Congress intended "interest" to have its conventional meaning, and that, in the case of corporations, it was thinking of a stock interest.

Upon the government's view of "interest", the railroad would be charged with criminal responsibility for acts of its agents undertaken, allegedly, not for the benefit of the road, but for the private gain of the agents. To predicate criminal liability on a corporation for acts so motivated, undoubtedly held secret from the corporate body, would be a departure from general principles of corporate, agency, and criminal law. No policy considerations suggest themselves for inflicting criminal penalties on a corporation because it has allegedly permitted itself to be victimized by faithless servants. Indeed, so arbitrary a result raises serious constitutional questions.

Consistent with the accepted meaning of "interest" in law, and the legislative history of section 10, and to avoid the anomalous, irrational result of adding public penalty to alleged private wrong, this Court should conclude, as did the district court, that the agreement of the Particulars does not set forth an "interest" in International.

ARGUMENT

I. SINCE THE AGREEMENT ALLEGED WAS NEITHER TO SHARE IN INTERNATIONAL, NOR ENFORCEABLE IF IT HAD BEEN TO SHARE, IT CONFERS NO RIGHT AND HENCE NO "INTEREST" IN INTERNATIONAL, EITHER IN THE CONVENTIONAL OR CLAYTON ACT SENSE OF THE WORD.

A. *An "interest" in common parlance is a right to share in something.*

Black defines the word "interest" as

"The most general term that can be employed to denote a property in lands or chattels . . . .

"More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right; a title to a share." Black's Law Dictionary (3d ed.), "interest".

Bouvier defines "interest", in contracts, as follows:

"The right of property which a man has in a thing." 2 Bouvier's Law Dictionary, "interest".

Webster's definition is similar:

"1a: The right, title, or legal share in something . . . ." Webster's Third New International Dictionary, "interest".

To meet these definitions, there must be some agreement, occurrence, or relationship which confers a *right* to *share*. The cases recognize these requirements. For example, in *Major* v. *Major*, 106 Ind. App. 90, 96, 15 N.E. 2d 754, 757 (1938), holding that a bequest of "whatever stock or interest I may own at the time of my death in the Major Brothers Packing Company" did not bequeath to the recipients of the bequest the indebtedness due the testator from said corporation, the court observed:

"Generally speaking, an indebtedness due from a corporation to another, even though the person to whom the debt is owing be a stockholder of the corporation, does not, because of the debt, confer upon the person to whom it is payable an interest in the corporation. It is not so generally understood. *A creditor's* right is superior to that of a stockholder, but he *has no right because of this relationship to any voice in the management or control*

of the corporation, or no interest therein within the meaning of that word in accordance with its *ordinary usage.*" (emphasis added)

And in *New York* v. *Stone*, 20 Wend. (N.Y.) 139, 140 (1838), ruling that owners of personal property in a building destroyed by order of the Mayor could not recover under a statute allowing damages to "any person interested in the building," the New York Court of Appeals observed:

> "The term *interest* . . . clearly imports some share in the building itself, and was intended, probably, if not to be regarded as synonymous with *estate*, to include any degree of interest or claim therein which might not, in technical language, fall within any of the subdivisions of estates.

Thus, for an "interest" in something to exist, there must be a sharing in such thing, enforceable under the law—a right to share.

B. *The "agreement" particularized is not an agreement to share or participate in International.*

The particulars do not tell us the terms of the alleged agreement, but they do declare its purpose and result, that:

> "of producing profits for International from dealings by it in property acquired from the B&M through the intervention . . . of defendants McGinnis, Glacy, and Benson . . ."

and

> "pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

These particulars in no way allege any agreement *to share in International.* This alone is fatal to the claim that they show an "interest" in International.

The government's brief implicitly recognizes that an "interest" imports a share. The government would have it that this element is present, saying that the particulars allege an agreement whereby the individual defendants would share in International's profits:

> "Pursuant to this arrangement for producing profits for International, McGinnis and Glacy were to receive substantial sums (R. 25), i.e. *they were to share in or receive part of the profits which the arrangement was intended to create for International.*"[1] (Government's brief, p. 8, emphasis added).

It is then argued that the claim of the individual defendants "to a substantial share in International's profits from dealings in property acquired from the carrier created a real interest in International, comparable to the interest of a shareholder . . . ." Government's brief, p. 9.

Even if an agreement to share in profits of International produced under the "agreement" in fact were alleged, this would not constitute an interest in *International* itself; it would amount at most, arguably, to an interest in the *profits* the agreement produced. But, this point aside, no such agreement is alleged; the particulars most emphatically do not allege that the individual defendants "were to share in or receive part of the profits." *The particulars simply do not say this.* They say only that pursuant to the agreement, the individual defendants "were to and did receive substantial monies". The "monies" are not geared in to the "profits" under the "agreement".

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[1] Similarly, the government declares in its question presented that under the agreement the individual defendants "were to and did receive a substantial share of the other firm's [International's] resulting profits." This is a new development since the government's jurisdictional statement where the question presented declared only that under the agreement the individual defendants "were to receive substantial monies from such firm." Jurisdictional Statement, p. 2.

The government seeks to buttress its position by resort to Count II of the Indictment (R. 10-13):

> "The allegations of Count II . . . show clearly that McGinnis and Glacy were to share in the profits which they had agreed to help International make." Government's brief, pp. 8, 9.

It is, however, an elementary principle of criminal pleading that allegations in one count of an indictment not incorporated by reference cannot be resorted to to save insufficient allegations in another count. See, *e.g.*, *Dunn* v. *United States*, 284 U.S. 390, 393 (1932) ("Each count in an indictment is regarded as if it was a separate indictment"); *Walker* v. *United States*, 176 F.2d 796, 798 (9th Cir. 1949) ("it [the challenged count] must stand or fall upon its own allegations without reference to other counts not expressly incorporated by reference"). But suppose we do look to Count II; we find at once that the government's statement is not borne out. Nowhere in Count II is it alleged that there was an agreement to share in International's profits. All that is alleged is that, with respect to the ten car transaction, the individual defendants received $71,500

> "derived almost entirely out of the proceeds from the resale by International of the said 10 coaches." (R. 12)

If the agreement was that the officials should receive a share of the profits, the officials' receipts would have come entirely, not almost entirely, from the proceeds of the resale. Apart from this, the allegation that in fact most of the money did, in this instance, come out of International's profits is not the equivalent of an allegation that there was an agreement to share in the profits from such transactions. And again, as pointed out earlier, even such an agreement would establish a share only in certain of International's profits, not in International itself.

C. *The agreement particularized was unenforceable; it therefore could confer no right and hence no "interest" in International.*

We agree with the government's stress of the fundamental principle of law which forbids self dealing by fiduciaries to the detriment of their principal. *Wardell* v. *Union Pacific R.R.*, 103 U. S. 651 (1880), cited by the government, p. 14, declares that

> "The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonable resisted. Directors of corporations . . . cannot as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits." 103 U. S. at 658.

Similar statements that corporate officers and directors are not permitted to use their positions of trust and confidence to further their private interests are found in many other judicial decisions. See, *e.g.*, *Guth* v. *Loft, Inc.*, 23 Del. Ch. 255, 5 A. 2d 503, 510 (1939); *Lazenby* v. *Henderson*, 241 Mass. 177, 180, 135 N.E. 302 (1922); Restatement, *Agency* 2d §§ 387-98; cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939).

Such being the law, the agreement alleged in the particulars, if proved, would surely be enforceable in no court in the land. Its objective is illegal.

The agreement being unenforceable, it can confer no *right* in the individuals to share in International or any of its profits. Lacking this element of a *right*, there can be no "interest" in International in any conventional sense of the word. Referring back to the law dictionary definitions earlier quoted, *ante* p. 5, the element of a right is basic: "more particularly it means a *right* to have the advantage

accruing from anything" and it is "the *right* of property which a man has in a thing". See also *Ragsdale* v. *Mays*, 65 Tex. 255, 257 (1886) ("The natural and ordinary meaning of the term 'interest in lands' includes the entire right held in them.")

It may be that the difficulty of the agreement giving rise to no enforceable right accounts for the curious phraseology of the Particulars. The Particulars declare that "The substantial interest . . . consisted of an . . . agreement . . . for . . . the purpose of . . ." etc. Now an interest is not an agreement; an agreement is not an interest. The beneficiary of a trust, asked what interest he had in the trust, would normally never answer—the declaration of trust; he would simply say that he was entitled to income or principal of the trust, or, in short, that he was a beneficiary. The government's equation of an agreement and the rights which may or may not stem from the agreement neatly veils the difficulty that the illegality of the agreement renders it impotent and productive of no rights at all. It avoids the red flag that would be presented by the words: their interest was their right in International arising under an agreement . . . . But the difficulty that the agreement creates no rights is there, nevertheless. In affirming that the word "interest" means a "legal interest" and "does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan" (R. 31), the District Court properly adhered to the commonly understood meaning of the word, as a *right* to share.

D. *An extra-legal concern, no matter how significant to the person concerned, does not give rise, in law, to an "interest".*

The government argues that "it is difficult to conceive of a scheme better calculated to create in the carrier's officers a substantial conflicting interest in International's

profits from dealing with the carrier" and that "The interest in International resulting from being a salaried 'director, manager, or purchasing or selling officer' of that corporation would be far less immediate and substantial." Government's brief, p. 13.

The government in these passages assumes a meaning of interest equivalent to a general concern. Whether such a meaning should be adopted here is of course the question at issue. The disadvantages of giving "interest" that meaning are well stated by the Massachusetts Supreme Judicial Court in *Inhabitants of Northampton* v. *Smith*, 11 Metc. (52 Mass.) 390 (1846). Speaking to a question of judicial disqualification, the court there said:

> "It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action. It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.
>
> "On examining this will of Oliver Smith, we cannot perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. . . ." 11 Metc. at 396.

The hazards of cutting loose from the traditional meaning of "interest" can be illustrated by reference to the bribe example put by the government in its brief. Pp. 11, 12. "It might be argued", the government concedes, "that

receipt of a cash bribe for favoring another firm in its dealings with a carrier does not create a sufficiently continuing interest in that other firm, for the other firm's success or failure in its dealing might remain a matter of relative indifference to the recipient of the bribe." This is a large concession, because, once it is recognized that the receipts of the individual defendants are not geared to International's profits, the case alleged at bar is seen to be not too far from the bribe case. Should there then be a difference in result if the proffered bribe is to be measured by the amount of profits the favored supplier realizes? Does the result change according to the prospects of further such bribes being forthcoming?

Once the judiciary breaks away from the legal meaning of "interest" it will face difficult questions of degree and it will have to answer them cut loose from the legal concepts and guidelines otherwise attending the word "interest".

E. *The word "interest" as used in the Clayton Act should be given its natural meaning.*

The government declares that "the language of section 10 of the Clayton Act was carefully chosen" Government's brief, p. 10. We see no reason to disagree. Further, we submit that Congress used the word "interest" with precision, conscious of its meaning in law, in statutes, to lawyers and judges, and that it expected the courts to observe that meaning. The teaching of this Court in *Morissette* v. *United States*, 342 U.S. 246, 263 (1951) could not be more apt:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in

> which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

This admonition that terms of art are to be given their normal meaning is reinforced by the equally familiar principle that criminal statutes are to be strictly construed, which carries the same message. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 96 (1820). We submit that whatever the legislative history or policy of section 10 of the Clayton Act, the judiciary could not properly adopt the construction of "interest" urged by the government, thereby forsaking the usual meaning of the word as a right to share.

II. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED THE WORD "INTEREST" IN THE CLAYTON ACT TO BE GIVEN ITS USUAL MEANING.

Far from suggesting that construction of "interest" should take a direction contrary to the normal meaning of the word, the legislative history of section 10 of the Clayton Act reveals two circumstances which show that Congress was thinking in conventional terms; that where interest in a corporation was involved, Congress had in mind stock ownership, legal or beneficial. First, the restriction in section 10 respecting an interest in another corporation with which a carrier might deal was inserted as a consequence of an objection that *stock* ownership in the other corporation would produce the same evil as an interlocking directorate. The initial House version of what was to become the Act (H. R. 15657, 63d Cong. 2d Sess. (1914))

prohibited only interlocking directorates. Representative Nelson had objected to so limited a restriction in his minority report to the bill, saying:

> "Dealings between two corporations in each of which the same men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured . . . . [Under H. R. 15657] they may own all the *stock* of such other companies." (emphasis added) H. Rep. No. 627, 63d Cong., 2d Sess., Part 3, p. 89 (1914).

The Senate responded to this expression of concern over evils stemming from ownership by carrier officials of a *stock* interest in the corporation with which their carrier might deal. It reported out a bill requiring competitive bidding where the carrier's agent "has any direct or indirect interest in" the corporation or other entity with which the carrier had dealings. S. Doc. 584, 63d Cong., 2d Sess. 13 (1914). The conference version, and the bill as enacted, substituted for the words "direct or indirect", the single adjective "substantial", producing the expression: "any substantial interest". S. Doc. 584, pages 13-14; 51 Cong. Rec. 15791 (1914).

The second circumstance showing that, as regards corporations, Congress was thinking conventionally, of a stock interest, is the explanation which was given on the floor of the House by Senator Chilton for the conference report's acceptance of the "interest" restriction. The purpose of requiring competitive bidding where a carrier official had a substantial "interest" in the corporate supplier or purchaser, Senator Chilton said, was as follows:

> "It not only prevents corporations which are interlocked by officers and directors, but it says: 'Or who has any substantial interest in such of them.'

The Senator will recall all we had before us, the ease by which interlocking directorates could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself.

• • • •

. . . They can not dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited." 51 Cong. Rec. 15943 (1914).

The placement by a carrier official of his son, cousin, or lawyer on a supplier's board would customarily, if not necessarily, be accomplished by the official voting his stock in the supplier for such person and surely this is what both Senator Chilton and his listeners had in mind when the foregoing explanation was made.

The government relies in its brief, page 23, on "the contemporary understanding of the railroad industry itself" as shown by General Counsel of Southern Railway Company, Alfred P. Thom, in remarks to the Interstate Commerce Commission June 20, 1916 on the subject of regulations to be promulgated under section 10. Why Mr. Thom's observations should be given any weight at all is not explained, but for whatever they may be worth, his statements to the I.C.C., far from supporting the government's position in this case, show that he too assumed that a *stock* interest in corporate suppliers was referred to. Pointing out that the words "substantial interest" are undefined, Mr. Thom asked:

"Now, *can the Commission say that a percentage, no matter how small, of the capital stock of the selling company,* or the company with which the dealing is, *will not be considered a 'substantial interest'*, whereas anything

above that percentage may or may not be a 'substantial interest' in accordance with the different nature of the different cases. If that could be said, *if the Commission will find a percentage, no matter how small, of the capital stock* of the company with which the transaction is, which the purchasing agent can lay down by the side of his transaction, and determine whether or not it comes within the requirements of this law, *an assistant will be given* to the practical purpose of the duties of these people, which is incalculable . . . ." *Administration of Section 10 of the Clayton Anti-Trust Act*, Ex parte 54, p. 39 (I.C.C. hearing, June 20, 1916). (emphasis added)

Thus, in the legislative history, not only is there no suggestion that Congress intended an illicit "agreement . . . and concert of action" in a corporate supplier or purchaser to be encompassed by the word "interest", but there are these affirmative indications that, where corporations were concerned, a conventional stock interest was what Congress had in mind.

III. A STATUTORY CONSTRUCTION HOLDING A CORPORATION VICARIOUSLY RESPONSIBLE, CRIMINALLY, FOR A PRIVATE AGREEMENT OF ITS AGENTS OUTSIDE THE SCOPE OF THEIR EMPLOYMENT AND CALCULATED ONLY TO HARM IT, WOULD BE A DEPARTURE FROM ACCEPTED PRINCIPLES OF LAW.

A. *The knowledge of the individual defendants of the acts here alleged, would not be chargeable to this corporate carrier in a civil proceeding.*

There is no suggestion in the Indictment or Particulars that the alleged "arrangement and concert of action" for producing profits for International, pursuant to which the individual defendants were to and did receive substantial moneys, was known to Railroad officials other than the individual defendants. The government in its brief speaks of

"a secret arrangement such as that alleged". Page 20, n. 13. It can hardly be doubted that an "arrangement" such as is alleged would be kept secret, locked firmly in the breasts of the participants. Such being the case, the Road would not be chargeable with knowledge of the transaction under principles of civil responsibility. "A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purpose . . .". Restatement, *Agency* 2d § 282. With the Railroad not being chargeable *civilly* for secret acts of its agents for their own personal benefit such as are alleged, it would ordinarily follow *a fortiori* that the Road would not be *criminally* responsible.

B. *Under general principles of law, corporations are held criminally responsible only where the acts of the agent from which liability would stem are motivated by a purpose to benefit his corporation, not the case here.*

While the law has come a long way since Blackstone declared that "A corporation cannot commit treason, or felony, or other crime in its corporate capacity" (Blackstone, *Commentaries* c. 18, § 12), no judicial decision that we know of has yet extended the criminal law to the point where corporate liability is predicated on an act by a corporate agent *which is designed solely to advance the personal interests and fortunes of the agent at the expense of his corporation.*

The leading Supreme Court case in this field of the law is *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481 (1909), holding constitutional imposition of liability on corporations for violation of the Elkins (anti-rebate) Act by reason of any proscribed act, omission, or failure of a corporate agent, acting within the scope of his

employment. Throughout this opinion, the Court stresses that the justification for imposing criminal liability on the corporation is because its agent's forbidden act *was done for the benefit of the corporation.* The court noted at the outset that corporations were responsible in tort for acts of their agents within the scope of employment, declaring:

> "And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. *In such cases the liability is* not *imputed* because the principal actually participates in the malice or fraud, but *because the act is done for the benefit of the principal,* while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct. *Lothrop* v. *Adams,* 133 Massachusetts, 471." 212 U.S. at 493 (emphasis added)

The Massachusetts court had said in *Lothrop:*

> "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, *but, the act having been done for his benefit by his agent acting within the scope of his employment in his business* it is just that he should be held responsible for it in damages." 133 Mass. at 480, 481. (emphasis added)

Passing to imposition of criminal liability on corporations for acts of their agents, the Supreme Court went on to say in *New York Central:*

> "We see no valid objection in law, and every reason in public policy, why *the corporation which profits by the transaction,* and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making

and fixing rates of transportation and whose knowledge and purposes may well be attributed to the corporation for which the agents act." 212 U.S. at 495. (emphasis added)

While the recent case of *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958) involved a partnership, rather than a corporation, it is pertinent here because it follows *New York Central* in resting criminal liability (for a knowing and wilful violation of the Motor Carrier Act) on the fact that the acts of the agents on which liability was predicated were done for the ultimate benefit of the principal. Relying on *United States* v. *Adams Express Co.*, 229 U.S. 381 (1913), which had in turn relied on *New York Central*, this Court said:

"The business entity cannot be left free to break the law merely because its owners, stockholders in the *Adams* case, partners in the present one, do not personally participate in the infraction. *The treasury of the business may not with impunity obtain the fruits of violations* which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law." 358 U.S. at 126. (emphasis added)

Truck drivers employed by the A & P partnership there transported dangerous articles in commerce without the examinations, certificates, markings, equipment, etc., required by I.C.C. regulations. These acts led to payments to the partnership from shippers for the articles thus transported and at the same time spared the partnership the time, trouble, and expense of compliance with the rules. Imposition of criminal responsibility on the carrier was justified as a reasonable offset to the prospective benefit a carrier might derive from encouraging its agents in illegal activity or winking at their violations.

Judicial decisions throughout the land which have sought to express the reason for imposing corporate res-

ponsibility for an agent's act in the particular situation presented have agreed that the reason is because the act was an effort to advance the corporate interest.

The Fifth Circuit in *United States* v. *Carter*, 311 F.2d 934 (6th Cir. 1963) held a corporation guilty of violation of the Taft-Hartley Act where its president had bribed a union representative, rejecting the argument of the corporation that it was not responsible for its president's criminal act. The Court agreed that:

> "It is essential . . . to corporate guilt, that its officer's or agent's illegal conduct be related to and be within the course of his employment *and have some connection with the furtherance of the business of such corporation.*" 311 F.2d at 942. (emphasis added)

But it concluded:

> "We think that it can be fairly inferred that in acceding to Felice's request for money and provide such money out of the corporation's funds, Carter, however illegal and misguided his actions were, did so in the course of his employment with, *and in furtherance of the business interest of, his company.*" Ibid. (emphasis added)

Holding a public utility corporation for violation of federal law in the making of campaign contributions, the Eighth Circuit declared that:

> "The test of corporate responsibility for the acts of its officers and agents, whether such acts be criminal or tortious, is whether the agent or officer in doing the thing complained of was engaged in 'employing the corporate powers actually authorized', *for the benefit of the corporation* 'while acting within the scope of his employment in the business of the principal'. If the act was so done it will be imputed to the corporation . . . . There is no longer any distinction in essence between the civil and criminal liability of corporations . . .". *Egan* v. *United States*, 137 F. 2d 369, 379, *certiorari denied*, 320 U.S. 788 (1943). (emphasis added)

The test in *Egan* was approved and applied in *United States* v. *Thomas*, 52 F.Supp. 571 (E.D.Wash. 1943).

Rejecting the contention that a corporation should not be held criminally responsible for the acts of subordinate agents,[2] the Second Circuit in the leading case of *United States* v. *George F. Fish Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) stressed the importance of the agents' motivation:

> "... to deny responsibility for the acts of minor employees is to immunize the offender *who really benefits*, and open wide the door for evasion." (emphasis added).

In *Steere Tank Lines Inc.* v. *United States*, 330 F.2d 719 (5th Cir. 1963) a corporate motor carrier was charged under the Motor Carrier Act with making false entries in drivers' logs. While the crime was that of knowingly and wilfully violating Commission rules, the statute was said to be in the malum prohibitum class. 330 F.2d at 723. It had been established that the false entries were made by truck drivers employed by the corporate carrier and the district court had charged:

> "Knowledge affecting the corporation, which has been gained by any officer, agent or employees thereof in the course of his work for the company is attributed to the corporation, and this includes subordinate employees, such as truck drivers." 330 F.2d at 723, n. 3.

The court found this charge to be error:

> ... knowledge sufficient to serve as a basis for a finding of a violation knowingly and wilfully done would depend on knowledge on the part of agents and employees of the corporation other than the truck drivers doing the falsifying. This necessarily follows from our holding in Standard Oil of Texas, supra, *for if the falsifications*

[2] There is a line of cases, which may perhaps be regarded as extreme, holding that violation by an agent of express instructions affords a defense to the corporation. See, *e.g.*, *Holland Furnace Co.* v. *United States*, 158 F.2d 2 (6th Cir. 1946); *John Gund Brewing Co.* v. *United States*, 204 Fed. 17, 23 (8th Cir. 1913).

> *were for the benefit of the truck drivers only, and unknown to any other agent or employee of the corporation, they could not rise to the level of proscribed violations.*" 330 F.2d at 723. (emphasis added)

The truck drivers would have been motivated, in making the false entries, primarily or exclusively by self-interest. The proof, however, had shown that "the extra hours were necessary in order for appellant to handle the business on hand with the available equipment and manpower" and that the manager knew of the falsifications. 330 F.2d at 721, 724. In the light of these facts, the court found that the error was harmless.

In *United States* v. *St. Louis Dairy Co.*, 79 F.Supp. 12, 19 (E.D. Mo. 1948), the Court instructed the jury

> "... that a corporation is bound by and legally responsible in a criminal case for acts performed or things done by an officer, agent, or employee of the corporation *when such officer*, agent or employee *is acting within the scope of his authority and the acts of such officer*, agent or employee *are performed for the corporation employing him* and are the duties delegated to him". (emphasis added)

See also *United States* v. *Brunett*, 53 F.2d 219, 236 (W.D. Mo. 1931) (corporate defendant criminally responsible for its manager's acts "acting for and on behalf of" the corporate defendant).

In *People* v. *Raphael*, 72 N.Y.S. 2d 748 (1947) the superintendent of an apartment house owned by the corporate defendant took an illegal bonus as a condition precedent to the renting of an apartment, resulting in prosecution of the employer corporation for violation of the rent control laws. While certain unsupported dicta in the case that a corporation is liable if "its officers participated in the crime" clearly go too far, the court held that the corporation should be acquitted, stressing the absence of any motive to benefit the corporation. Distinguishing *C.I.T.*

Corporation v. *United States*,[3] 150 F.2d 85 (9th Cir. 1945), where C.I.T.'s local manager, Wilkens, had made false statements in applications for FHA insurance on loans made by the corporation, the New York court pointed out:

> ". . . Wilkens did not make any personal profit or did not obtain a personal benefit out of the criminal transactions. *The benefits or profits of these transactions accrued to the corporation.* It is evident that the facts of the C.I.T. case are distinguishable from the case at bar. *There is no proof in the instant case that the benefits or profits of the criminal act accrued to the corporation.*" 72 N.Y.S. 2d at 752. (emphasis added)

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[3] This case, along with *Old Monastery Co.* v. *United States*, 147 F.2d 905, 908 (4th Cir. 1945) ("We do not accept benefit as a touchstone of criminal liability; benefit, at best, is an evidential, not an operative fact.") and *United States* v. *Steiner Plastics Mfg. Co.*, 231 F.2d 149, 153 (2d Cir. 1956) is sometimes cited for the proposition that if the agent is simply performing his corporate function, his corporation may be held criminally responsible for his acts. Though some of the observations in these cases appear to us to go too far, they are understandable in their settings. In all of these cases, the agents' acts were unquestionably motivated by a desire to further the corporate interests.

In *C.I.T.*, a conspiracy to falsify credit statement-applications for the purpose of getting FHA insurance was alleged. Wilkens, the defendant's local manager, was shown to be involved. Clearly, he had no personal interest to advance by participating in the scheme. His corporation was to get the insurance and make the money. Wilkens must have acted with this purpose in mind.

In *Old Monastery*, a corporation was charged with conspiracy to violate the Emergency Price Control Act. The proof was that its president caused sales of whiskey to be made by the corporation at above-ceiling prices and that he caused the corporation to give a check for $1,800 as a "commission" to the buyer. Again, it was the corporation, necessarily, that benefited from the sales, receiving an illegally high price for the whiskey. The buyer received the bribe, not the corporation's president. Therefore, in this case too, the agent's act was necessarily in furtherance of the interests of the corporation.

In *Steiner*, a corporation was charged with a criminal scheme to evade inspection requirements for airplane cockpit canopies manufactured for the government. Rejecting the argument that no

In another New York case, *Standard Food Products Corp.* v. *O'Connell*, 296 N.Y. 52, 69 N. E. 2d 559(1946), the Court of Appeals reversed a suspension of the license of a corporate liquor dealer, where its agent had fraudently diverted whiskey allotments to unlicensed retailers. The corporation was charged with violation of a state law that "no wholesaler shall sell . . . any alcoholic beverages . . . to any person who is not duly licensed." The statute defined "sale" as "any transfer . . . in any manner or by any means." The court observed that "when acts not mala in se are to result in loss or impairment of life, liberty or property the applicable statute should be narrowly construed." 69 N.E. 2d at 561. It then held:

> "Both the petitioner-appellant and the purported purchaser were the victims of a fraudulent scheme engineered by a dishonest employee, and there is no factual support for the conclusions that the petitioner-appellant either sold or agreed to sell or deliver liquor to any unlicensed person for the purpose of resale, as defined by the statute." 69 N.E. 2d at 561.

These many judicial decisions surely establish that a motive to benefit the corporation is essential to predicate corporate liability on its agent's act. By contrast, the arrangement in question, and the acts of the individual defendants, are in no way calculated to advance the in-

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officers of the corporation were shown to be involved, the court, following *Fish, supra*, p. 21, said "It was enough that agents of the corporation acting within the area entrusted to them had violated the law." 231 F.2d at 153. Here, too, the corporation, and only the corporation, benefited from the scheme, and its agents, in carrying it out, could only have been seeking to advance the corporate interests.

Supporting these conclusions is *Standard Oil Company of Texas* v. *United States*, 307 F.2d 120, 129 n. 19 (1962) discussing *Steiner* and other like cases, and concluding that "In each of them the corporate agent, whether a mere employee or, as in most cases, a high-ranking executive, intended that the corporation benefit through the production of business furthered by the action in controversy."

terests of the carrier. Since the government's proferred construction of the word "interest" would render the government's charge sufficient, notwithstanding the absence of this necessary element, it should be rejected.

C. *Not only would the alleged "arrangement" of the B&M's officials, which the government says gives them a forbidden "interest" in International, not benefit the B&M; it would affirmatively harm the B&M, making it all the more anomalous to hold the carrier criminally responsible for the existence of this type of "interest".*

The case at bar, and the prosecution of this carrier, is extraordinary and unique. The alleged acts of its agents upon which liability would be rested were, if the particulars are accepted as true, undertaken not only without a motive to benefit the carrier *but with an affirmative intent to harm the carrier.*

The government does not dispute the presence in this case, as pleaded, of this additional element of an alleged purpose to harm the carrier. It declares, however, that the statutory scheme inherently produces the "seemingly anomalous result" of subjecting a carrier "to penalties for acts of its officers or directors which were intended to victimize the carrier." Government's brief, p. 20. Elsewhere the government emphasizes that the acts of its agents for which the corporation is sought to be charged were calculated affirmatively to harm the corporation:

"... the statute ... is intended to prevent the officials of a carrier from causing it to deal *on unfavorable terms* with another firm in whose profits the carrier's officials expect to share. *This is precisely what the district court found was the nature of the scheme described in the indictment: 'an illegal and illicit plan to siphon off for* [*the individual appellees'*] *personal benefit property of the*

Boston and Maine Railroad through the medium of International.' " Government's brief, p. 7. (emphasis added)

And again:

"The instant arrangement to benefit from the profits of International's dealings in Boston and Maine property made the individual appellees' interest in International's gain from any transaction with the carrier directly dependent upon the extent of their departure from their fiduciary obligation: *the greater the harm to the carrier* from an inadequate sales price, the more certain and greater the profits to International of which they would receive a substantial part." Government's brief, p. 13. (emphasis added)

In searching the judicial decisions for an analogy to the case at bar, the one case that we have been able to find where a corporation was subjected to federal prosecution for unwittingly permitting itself to be victimized by its agents is *Standard Oil Company of Texas* v. *United States*, 307 F.2d 120 (5th Cir. 1962). The court held the corporations there involved not criminally responsible, and accordingly acquitted them: Two corporations had been charged criminally with violation of the Connally Hot Oil Act. Certain employees of these corporations had operated an illegal scheme for the benefit of a third party in consideration of cash bribes from the third party wherein they ascribed oil actually produced by one of the corporations to a third party. In the course of this scheme, the agents of the defendant corporations caused the corporations to transport contraband oil in interstate commerce. Whether criminal responsibility could be imposed "when all of such oil came into the custody of each corporation solely as a result of a deliberate purpose by unfaithful employees to cheat or steal is the legal question", the court said, "for our determination". 307 F.2d at 124, 125. The trial court had declared:

"The test, in deciding whether the conduct and knowledge of these employees should be imputed to the em-

ployer, does not turn on action consistent with or contrary to company policy, but instead the touchstone is the function of the employee.'' 307 F.2d at 128, n. 15.

This test, the Fifth Circuit found, was too broad. Relying on *New York Central* and *A & P Trucking*, it said:

> ''Of course the defendants do not contend, nor could they, that criminal accountability and actual benefit are equated. There have been many cases, and there may well be others in the future, in which the corporation is criminally liable even though no benefit has been received in fact. *But while benefit is not essential in terms of result, the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation.* For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235.'' 307 (F.2d at 128 (emphasis added)

It went on:

> ''It is for this reason that the simple 'function' test applied by the District Court—while obviously a factor of relevance—is alone insufficient upon which to rest convictions here. Thus the taking in or paying out of money by a bank teller, while certainly one of his regular functions, would hardly cast the corporation for criminal liability if in such 'handling' the faithless employee was pocketing the funds as an embezzler or handing them over to a confederate under some ruse.'' Ibid.

Applying these principles the court concluded that the corporations should not be held criminally responsible for ''the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer''. 307 F.2d at 129.

The crime in *Standard Oil*, to be sure, was a *knowing* transportation of the oil, a point stressed by the court. But

the court assumed that the knowledge required was "merely of the actions which constitute the crime" as distinguished from "a consciousness that the actions taken violate a known law". 307 F.2d at 126. And much of the language and reasoning of the court, particularly the example of the bank teller throws question on whether the result would have been different had the word "knowingly" been omitted.

D. *No public policy or other rational justification exists for a construction imposing criminal liability on a corporation on allegations such as are made here.*

In our brief in support of the railroad's motion to affirm the judgment below, we asked, at pages 3 and 4:

> "Is it reasonable, assuming proof of the charges, to penalize a Railroad, its stockholders and ultimately the public, because it has become the victim of an illegal scheme by its officials to divert Railroad assets to their personal benefit? . . . And if the 'arrangement' is undisclosed and secret as suggested and therefore not within the Railroad's control or power to forestall, what is to be gained by adding the penalty of criminal sanctions to the carrier's losses accruing from the scheme? If the statute is to be construed to penalize a carrier for allegedly allowing itself to be victimized by the illegal, secret conspiracies of its officials, does such a construction not raise serious constitutional problems?"

The answer given by the government is that "the statute plainly imposes an absolute liability on the carrier, although it is typically the unknowing victim of the harms proscribed by the statute." Government's brief, p. 20, n. 13. This answer merely assumes the result the government seeks; it suggests no *reason* why such a result is desirable. It does not answer our question as to whether it is *reason-*

able here to so construe the statute as to add criminal penalties to the carrier's woes.

Even if the special circumstances of this case were set to one side, we think it highly doubtful that corporate carriers, despite being "unknowing victims", should be held absolutely liable, criminally, for violation of section 10. As we have shown, this would be a radical departure from general principles of corporate and criminal law. The line of cases holding individuals and corporations liable for so-called malum prohibitum crimes are not precedents for such a result. The element of indifference of the corporate agents to the corporation's welfare, as alleged, distinguishes this from such cases. Unauthorized possession or distribution of contraband, narcotics or adulterated drugs, for example, may constitute criminal conduct and no one doubts that valid policy considerations underlie the federal statutes so providing. Applied to individuals, these statutes are not unreasonable, notwithstanding that an evil intent is not an element of the crime. Nor is their application to corporations, so long as the act of possession or distribution by the corporation's agents is undertaken for the corporation in the scope of employment. Individuals, by nature, are motivated by self-interest. Under the conditions stated, corporate agents are motivated to advance the interest of their corporation. These statutes appeal to such interest, offsetting by threat of punishment whatever gain the illegal act affords and thus serving to deter illegal conduct. But where the corporate agents knowing of the relevant acts are not motivated to benefit their corporation, it accomplishes nothing to appeal to their desire, which by definition is nonexistent, to avoid hurting the corporation. Whether the offense is malum prohibitum or mala in se, a statute imposing criminal liability on the corporation under such circumstances would be arbitrary, and not rationally defensible.

It is noteworthy that no prosecution under section 10 is revealed in the reported cases from the time of its enactment, 1914, until initiation of the instant case.[4] Perhaps other federal prosecutors have not been so sure that section 10 imposes absolute liability on carriers. Perhaps the court might find in an unusual case, a sufficient possibility of gain *to the carrier* from an interlocking relationship to justify imposing criminal liability for its existence. Perhaps the court would hold that *knowledge* of the occurrence of the act or relation is an implied element of crime, as it did in *Morissette* v. *United States, supra*, 342 U.S. 246. If such alternatives must be rejected, however, and "absolute liability" must be imposed on the "typically . . . unknowing victim of the harms proscribed," do we not then have a statute so arbitrary and irrational that a criminal fine imposed under it amounts to a deprivation of property without due process of law in violation of the fifth amendment?[5] Cf. *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963).

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[4] The only judicial decision we know of even to find section 10 applicable to the fact situation presented was In re *Missouri Pacific*, 13 F. Supp. 888 (E.D. Mo. 1935). The court there issued an order in the course of a reorganization proceeding requiring the Missouri Pacific's trustee to disaffirm a contract as in violation of the Clayton Act. The court observed, " . . . section 10 . . . has never been construed, so far as I know, for counsel have cited no cases construing it, nor have I found any . . . ." 13 F. Supp. at 892. Since that time, the only cases we have found discussing section 10 are likewise civil cases and all hold the section inapplicable: 1943—*Beegle* v. *Thomson*, 138 F.2d 875, 880 (7th Cir.) (patent infringement and treble damage suit: "interest" in securing the business of a large shipper not an "interest" under section 10); 1959—*Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173 (even if section 10 otherwise applicable, in view of section 5(11) of the Interstate Commerce Act, I.C.C. order permitting carrier acquisition of stock in another carrier legal) and *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F.Supp. 743 (N.D. Cal.) (treble damage suit — supplier with director on board of carrier not barred by section 10 from refusing to sell to competitor suppliers).

[5] We think it no longer doubtful, if it ever was, that the protection of the fifth amendment against deprivation of property

We do not perceive that any of the aspects of federal policy said to be behind the Clayton Act (Government's brief, pp. 10, 11) are advanced by imposing absolute liability on "unknowing" carrier victims. While criminal prosecution of the responsible individuals may be quite another thing, we do not see how the branding of the carrier as a criminal and imposition of a fine protects "the strength of the national transportation system", maintains "the integrity of the assets and accounts" or preserves "the system of free and fair competition among industries dealing with carriers." As pointed out, the honest officers, directors, agents, and stockholders of the carrier will already be fully motivated to forestall a dishonest scheme such as is particularized. The piling of injury by public penalty upon injury from private wrong would add nothing to their ability or desire to prevent a looting operation and would merely compound the damage to innocent stockholders of the carrier and the public it serves.

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without due process of law applies to corporations as well as individuals. This court recently permitted a corporation to take advantage of the double jeopardy provision of the same amendment in *Standard Coil Products Co.*, v. *United States*, 369 U.S. 141 (1962). We believe the assumption set forth in *County of San Mateo* v. *Southern Pacific R.R.*, 13 Fed. 145, 151 (D. Cal. 1882) holds true today:

> "The fifth amendment to the constitution contains a prohibition upon the government of the United States, similar to the one in the 14th amendment against the action of the states, declaring that no person shall be deprived of life, liberty, or property, without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against a confiscation equally with that of individuals."

The broad statements of inapplicability of the fifth amendment to corporations in *United States* v. *Guterma, et al*, 174 F. Supp. 581 (E.D. N.Y. 1959) and *United States* v. *Alabama Highway Express*, 46 F. Supp. 450 (N.D. Ala. 1942) should clearly be limited to the privileges against self-incrimination and unreasonable searches with which those cases were alone concerned.

These difficult problems which might be met in the case of an officer's undiscovered stock ownership in the supplier of a carrier are not, however, met in the case at bar *unless* the Court finds that the illegal agreement to produce profits in International alleged in the Particulars gave the individual defendants an "interest" in International. As we have shown, such a construction does violence to the accepted meaning of the word and is contraindicated by the legislative history. The reasons advanced by the government for embracing such a construction, however valid they may or may not be as applied to the individual defendants, all miss the mark when considered from the standpoint of the carrier. We submit that there is no reason in public policy for holding this corporate carrier criminally responsible for the "agreement" of its officials and International set forth in the Particulars to siphon off the carrier's assets to their own private gain.

CONCLUSION

The judgment of the District Court dismissing Count I of the Indictment should be affirmed, at least insofar as the defendant Boston and Maine Railroad is concerned, or in lieu thereof, the District Court should be directed to enter a judgment of acquittal[6] as to Boston and Maine Railroad.

Respectfully submitted,

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[6] With the filing of the Particulars, it becomes apparent that at trial the government's evidence would be insufficient to support a conviction, thus accelerating the time when entry of a judgment of acquittal was in order. See In re *United States*, 286 F.2d 556, 562, 566 (1st Cir. 1961) ("at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit"); *United States* v. *Maryland Co-operative Milk Producers*, 145 F. Supp. 151, 152 (D.C. 1956) (acquittal entering after filing of trial stipulation by government); *McGuire* v. *United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States* v. *Dietrich*, 126 Fed. 676, 678 (C.C. Neb. 1904). The Railroad's motion to the District Court was for judgment of acquittal, or, alternatively, to dismiss (R. 29).